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IN THE

Supreme Court of the United States

CLAYTON ANTHONY WALKER, Individually and as the Administrator of the Estate of Breanna Nicole Walker on behalf of Breanna Nicole Walker,

Petitioners,

v.

RUSS MUNSELL, Officer; DAVID HOOTER, Officer; RODNEY WALKER, Officer,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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There is a split in the circuits, to which the Fifth Circuit adheres to the minority position, on the issue of whether a conviction for resisting arrest, where there is no right of habeas corpus to challenge the constitutionality of the arrest bars a § 1983 action arising out of the same arrest pursuant to *Heck v. Humphrey*. Had the Petitioner herein been in another circuit, he would be allowed to proceed with his claim, despite the conviction; yet, because he is in the Fifth Circuit, the claim is barred.

QUESTIONS PRESENTED

I. Does a conviction of resisting arrest bar a 28 U.S.C. § 1983 excessive force claim arising out of the arrest under *Heck v. Humphrey*?

II. Where the Plaintiff was not sentenced to incarceration and has no legal basis to file a writ of habeas corpus, did the lower courts err in finding *Heck* applicable to the present § 1983 action?

III. Where the Defendants failed to affirmatively assert a *Heck* related defense in their *Answer*, was the *Heck* defense waived and did the lower courts err in allowing the Defendants to raise by motion a defense not pled in the answer?

IV. Did the district court err in failing to certify its ruling on the excessive force claim for appeal.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit filed June 13, 2008 may be found in Appendix "A." The order of the United States District Court for the Middle District of Louisiana dated January 11, 2008 may be found in Appendix "B."

JURISDICTION

The Judgment of the United States Fifth Circuit Court of Appeal was entered on June 13, 2008, (App. A). This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This Section 1983 action arises out of a November 3, 2006, traffic incident. Petitioners are seeking review by writ from this Court to clarify a split in the circuit courts regarding *Heck v. Humphrey*. The minority position taken by the Fifth Circuit is that *Heck* applies to excessive force cases involving a conviction for resisting arrest regardless of whether or not the plaintiff was or is incarcerated and whether or not the plaintiff has any other legal avenue (petition for habeas corpus) to challenge the constitutionality of the arrest.

This Court should grant this writ application to review the manner in which the Fifth Circuit is applying *Heck* to bring consistency to its circuit courts.

A. Nature of the Case

This Section 1983 action arises out of a November 3, 2006, traffic stop.

During the early morning hours of November 3, 2006, a wet and cold night, Mr. Walker was awoke and sent to the store to retrieve medication for his pregnant fiance. Mr. Walker pulled over after he noticed a police vehicle following him that directed a search light into the car.

A Denham Springs K-9 unit police officer approached requesting license and registration. When Mr. Walker turned toward the car to reach for the glove box, he was struck from behind and went down, and some point, he was turned and maced directly in his eyes. That same officer radioed for back up.

When the next officers arrived, Mr. Walker was already face down on the ground with his hands behind his back. An officer began moving his arms and instructed Mr. Walker to stop resisting arrest. Mr. Walker responded that he was not resisting.

One officer placed his boot on the back of Mr. Walker's neck forcing his head against the concrete, while yet another officer kicked him in the ribs, head, legs and back. Mr. Walker testified, "I was cuffed. I was kicked in the sides, in my hip and in my head." He was lifted and dropped on his face while handcuffed and "[a]fter that everything pretty much come a blur. I was hyperventilating. I couldn't breathe. I lost eyesight in the both eyes. Everything just started happening real fast."

Mr. Walker testified repeatedly both during his deposition and the criminal trial that after being struck on the head, he had little memory of the incident. He does not recall running, entering any woods, his clothing being removed, or numerous other events of the night. Moreover, early on he was maced directly in his eyes and was blind during most of the incident. Mr. Walker testified he lost consciousness.

In his trial testimony in state court, Mr. Walker testified as follows:

> Q. What do you recall after being struck from behind?
>
> A. Basically, I, I remember hitting the ground. After that everything went - just became a blur because it — I was in shock. I was — I really couldn't place what was happening.
>
> Q. Do you recall what happened, though, what do you recall happening —
>
> A. Just —
>
> Q. After you got struck from behind?
>
> A. Just hitting the ground. That was just basically all. I just kind of blacked out. I was not sure what was really going on at that time.

Q. Okay. Did you run?

A. No ma'am, I don't believe I did.

Q. The officer says as soon as he stopped, you got out of the car and started running.

A. No, ma'am, I don't recall myself running.

Q. Okay. What — at what point do you recall what was going on; I mean, are you kicked, punched, or anything like that?

A. I remember being kicked in the side of the head and the right side of my hip, my face. Basically all over. It was just — I just felt like I was just getting beat on. Like I said, I started to hyperventilate, I blacked out after being sprayed. I was not able to see anything. My breathing was very hard.

Q. All right. Now, do you remember them taking you out of the woods.

A. No, ma'am.

Q. Okay. Do you remember walking at all.

A. No ma'am.

Q. What is the next thing that you recall?

A. Being transported to Denham Springs Police Department.

Upon release, he went to the emergency room for treatment. Among multiple lacerations and bruises, his left knee bore a four-inch cut and bruising. He had difficulty walking and balancing himself due to hip, knee, and back injuries. After treatment, particularly to his corneal abrasions, he was released.

After being released, he began vomiting blood, returned, was advised that both of his kidneys had failed, and he was admitted for dialysis as shown by the certified medical records.

On July 3, 2007, Dr. F. Allen Johnston rendered a medical opinion of L-4/L-5 and L-5/S-1 disk injuries were related to the incident, and he recommended epidural steroid injections and other procedures.

Mr. Walker was charged and convicted by a Denham Spring City Court of three (3) counts of resisting arrest and (1) **count of failure to use a turn signal**, for which he was fined.

Each of the three officers involve deny any harmful touching took place; yet, the medical records and booking and other photographs document injury.

According to Officer Munsell, he initiated three charges of resisting arrest for the following acts:

> Q. Who initiated the complaint with three charges of resisting?
>
> A. I did. [Munsell]
>
> Q. And the charges as I understand it are he ran, he put his hands on his torso, and what was the third one?
>
> A. When he put his hands under his torso he resisted more than one police officer.

The charges of resisting arrest, thus, do not address any alleged violent conduct on the part of Mr. Walker or the Officers. The charges in no manner address any of the injuries sustained by Mr. Walker during the stop. The Officers in no manner account for any harmful touching during the arrest.

The *Transcript* of the criminal proceeding reveal that the Denham Springs City Court Judge made no findings of fact remotely addressing how Mr. Walker was injured during the incident. None address any harmful touching by any of the officers. There is no finding of reasonable force.

There are no fact findings of what physical contact transpired prior, during or after Mr. Walker entered the woods. The only touching reported is that Officer Munsell admits to pushing Mr. Walker to the ground and macing him. Officer Walker admits to a brief attempt

to pull Mr. Walker's arms from under his body. On the other hand, Mr. Walker does not recall ever running, being in the woods, and claims he was battered both before and after being handcuffed. The conviction did not require any finding as to whether the force used in making an arrest was "reasonable."

B. Procedural history

On November 13, 2006, the Plaintiffs filed *Complaint* pursuant to 42 U.S.C. § 1983 asserting a cause of action for excessive force, unreasonable search and seizure, deliberate indifference to medical needs, cruel and unusual punishment and malicious prosecution naming five Denham Springs City Police Officers, three of whom remain as party defendants.[1] On January 10, 2007, the answer filed **failed to set forth an affirmative defense related to the *Heck* motion** that followed.

On May 25, 2007, after limited discovery, the remaining officers, who are respondents herein, filed a motion for partial summary judgment seeking dismissal of the 8th Amendment claim for cruel and unusual punishment. Unopposed the motion was granted.

On May 25, 2007, those officers filed a second motion requesting a dismissal without prejudice or a stay of the action pending the outcome of the criminal

1. Since Mr. Walker had little sight during or memory of the event, several depositions limited to the issue of the qualified immunity affirmative defense were taken, after which, two officers, whose involvement was shown to be tangential rather than direct, were voluntarily dismissed.

prosecution in light of *Heck*. ("[C]laims are **premature** and have not accrued in light of the pending criminal prosecution".) [Emphasis added]

On July 3, 2007, the Plaintiffs filed an opposition to the Defendants' motion to dismiss and alternative motion for stay to which the Defendants replied. On August 24, 2007, the District Court entered *Ruling on Motion to Dismiss* overruling the motion to dismiss the claims for failure to provide medical treatment and withholding ruling on the dismissal of the claims for unreasonable search and seizure and excessive force until "notified of results of the plaintiff's [criminal] trial in state court."

On August 27, 2007, the Defendants renewed their motion to dismiss the excessive force claim and supplemented the record with the state court conviction of Clayton Walker for three (3) counts of resisting an officer and (1) **count of failure to signal**, for which he was fined.

On August 28, 2007, the District Court entered *Order* allowing the Plaintiffs an opportunity to file a response finding that if no response was filed "the claims for excessive force and malicious prosecution will be dismissed with prejudice to their being asserted again until the *Heck* conditions are met."

On or before September 17, 2007, the Plaintiffs filed an opposition to the second motion to dismiss. The Plaintiffs attached a certified medical record relating the back injuries to the incident.

On September 20, 2007, the District Court entered *Order* converting the motion to dismiss to a summary judgment. The Plaintiffs filed an additional memorandum with additional certified medical records from the emergency room treatment following the incident.

On October 1, 2007, the District Court entered *Ruling on Motion for Summary Judgment*, dismissing the Plaintiffs' excessive force and malicious prosecution claims "with prejudice until the *Heck* conditions are met".

After Plaintiffs unsuccessfully attempted to have the *Ruling* certified for appeal, the Plaintiffs opted to dismiss the remaining claim for failure to provide medical care on the basis that it was not cost effective to prosecute that claim alone to allow the present appeal on the excessive force claim. Final judgment was entered, from which an appeal followed.

On June 13, 2008, the Court of Appeal issued a *Per Curiam* decision to affirm the lower court ruling. The *Judgment* of the Fifth Circuit was issued as a mandate on July 8, 2008.

C. Statement of relevant facts

Mr. Walker was convicted of three counts of resisting arrest and failure to use a turn signal, which the Fifth Circuit found barred him from bringing a claim that excessive force was used against him during the arrest.

Despite the material facts at issue, the Fifth Circuit found that the claim —

> is not that the officers used excessive force after he stopped resisting or to stop his resistance; his claim is based solely on his assertion that he did not resist arrest, did nothing wrong, and was attacked by the Appellee officers for no reason. Thus, Appellant's suit 'squarely challenges the factual determination that under lies his conviction for resisting an officer,' and if he prevails, 'he will have established that his criminal conviction lacks any basis' *Arnold v. Town of Slaughter*, 100 F.App'x 321, 324-25 (5th Cir. 2004).

Not one of the lower courts mentions the fact that in this case, the officers deny any harmful touching; yet, Mr. Walker suffered serious bodily injury. Moreover, Mr. Walker testified that after getting out of the car and being hit, he basically remembers very little and that he cannot recall ever resisting arrest or doing anything to provoke the battery. After being maced he was virtually blind. Thus, not only did the Fifth Circuit improperly apply *Heck* to a Section 1983 action, where material facts are in dispute, which precluded summary judgment, they applied it to a case where there was no confinement.

REASONS FOR GRANTING THE PETITION

A. Does a conviction of resisting arrest bar a 28 U.S.C. § 1983 excessive force claim arising out of the arrest under *Heck v. Humphrey*?

Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), involved a prisoner who was challenging the constitutionality of his arrest and conviction. This Court granted writs and noted that the prisoner had two avenues: writ of habeas corpus or civil rights action. The Court determined that where habeas relief was still available to assert the constitutional challenge, the prisoner could not yet bring the civil rights action. That was *Heck*, plain and simple, but since *Heck*, dicta within that case has formed a spring board for certain minority circuit courts to apply *Heck* to criminal convictions, from which an appeal may lie that would not invoke a constitutional challenge, to dismiss numerous civil rights cases where the plaintiff has no avenue for the constitutional challenge to actions of police officers taken during an arrest. *Heck* is being applied to nonprisoners who have no right to seek a writ of habeas corpus to challenge the constitutionality of the arrest, conviction or sentence. This application for a writ of review seeks clarification from this Court as to whether this Court intended such result and to resolve the split in the circuits.

In *Heck v. Humphrey*, 512 U.S. 477, 486, 114 S.Ct. 2364, 2370, 129 L.Ed.2d 383 (1994), this Court wrote:

> This requirement "avoids parallel litigation over the issues of probable cause and guilt

> . . . . and it precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."[2] . . . We think the hoary [ancient] principle that civil tort actions are not appropriate **vehicles for challenging the validity of outstanding criminal judgments** applies to § 1983 damages actions **that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution**. [Emphasis added]

Since *Heck*, the dicta, cited above, has formed a spring board for the Fifth Circuit to find that *Heck* precludes excessive force claims arising out of arrests where the habeas ineligible plaintiff has been convicted and fined for resisting the same arrest. It is unlikely that this Court intended such by its dicta in *Heck* as indicated by *Muhammad v. Close*, 540 U.S. 749, 750, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004), where this Court granted a writ to resolve yet another split in the circuit courts arising from the application of *Heck* to disciplinary proceedings and, there, explained the limited application of *Heck* by writing, as follows:

> In [Heck], we held that where success in a prisoner's § 1983 damages action would

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2. Citing, 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28.5, p. 24 (1991).

> **implicitly question the validity of conviction or duration of sentence**, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence. Accordingly, in *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), we applied Heck in the circumstances of a § 1983 action claiming damages and equitable relief for a procedural defect in a prison's administrative process, where the administrative action taken against the plaintiff could affect credits toward release based on good time served. **In each instance, conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies.** [Emphasis added]

In *Muhammad*, 540 U.S. at 754-755, the prisoner's § 1983 claim was allowed to proceed because, as this Court wrote, "That is, he raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that Heck's favorable termination requirement was inapplicable." The same rule of law should apply to excessive force claims where the plaintiff raises no claim on which habeas relief may be granted.

Nevertheless, while the Fifth Circuit has taken *Heck*'s quoted dicta, supra, in one direction, it appears

this Court has taken *Heck* in another direction and there is a split in the application of *Heck* between the 5th and nearly every other circuit in this Country. See e.g., *Nieves v. McSweeney*, 241 F.3d 46, 52-53, 52 n. 4 (1st Cir. 2001); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999) (use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction); *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3rd Cir. 1998) (finding § 1983 false arrest claim not barred by *Heck*); *Robinson v. Doe*, 272 F.3d 921, 923 (7th Cir. 2001) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest); *Wallace v. City of Chicago*, 440 F.3d 421, 428 (7th Cir. 2006) (aligning itself with the "The First, Third, Eighth, Tenth, and Eleventh Circuits."); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (finding § 1983 coerced confession claim not barred by *Heck*); *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005), *cert. denied sub nom, City of Hemet, Cal. v. Smith*, 545 U.S. 1128, 125 S.Ct. 2938, 162 L.Ed.2d 866 (2005) ("Because on the record before us we cannot determine that the actions that underlay Smith's conviction upon his plea of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction."); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest);

Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 558, 559 n. 4 (10th Cir. 1999); *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (per curiam) (finding § 1983 illegal search claim not barred by *Heck*); *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir. 2001), *cert. granted and judgment vacated on other grounds*, 537 U.S. 801, 123 S.Ct. 68, 154 L.Ed.2d 2 (2002) (holding that a finding of excessive force in a § 1983 action would not necessarily imply the invalidity of the plaintiff's conviction for resisting arrest).

The fact that *Heck* struck a balance between habeas corpus and civil relief has long been tossed by the wayside in the Fifth Circuit, where *Heck* has become a bar to prosecuting excessive force cases in cases where the plaintiff is convicted of resisting that arrest.

The Fifth Circuit itself has recognized that it is in the minority position and in *DeLeon v. City of Corpus Cristi*, 488 F.3d 649 (5th Cir. 2007), where the plaintiff who was maced and shot, pled guilty to aggravated assault on a police officer, and brought a 1983 action claiming false arrest, false imprisonment, malicious prosection, and **excessive force**. The facts pled by DeLeon described a violent scuffle with an officer, and a fight over the baton. DeLeon claimed he got the officer down in a bear hug and then backed off. The officer then pulled a gun and shot Mr. DeLeon several times including two shots that landed just below his heart. On conviction, Mr. DeLeon *received a deferred adjudication* and, thus, was not incarcerated. Nevertheless, the Fifth Circuit found the *Heck* favorable termination bar applied.

Without any discussion as to how a judgment in favor of *DeLeon* on his excessive force claim would "necessarily" implicate the invalidity of his conviction or sentence, the Fifth Circuit recognized the following,

> "*Heck*'s favorable termination doctrine is supported by two somewhat -independent rationales, which divide the Court and circuits even today. One, articulated by Justice Scalia, views Heck foremost as a section 1983 decision, narrowing the reach of that civil-rights statute by reference to the common law of tort in 1871. Another, articulated by Justice Souter, views Heck foremost as a habeas decision, a practical gloss on section 1983 to accommodate the habeas statute's exhaustion requirements. This circuit remains in the first camp, where Heck stands first for 'the hoary [ancient] principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.' In short, the common law animated Heck, and so it lights our way today."[3]

Acknowledging the split in the circuits, the Fifth Circuit, 2007 WL 1560082, at *4, nt. 23, listed, the following, "Compare *Jenkins v. Haubert*, 179 F.3d 19, 26 (2d Cir. 1999) (adopting Justice Souter's view that *Heck* should apply only when the plaintiff has access to a habeas remedy) and *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n. 3 (6th Cir. 1999) and *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) with *Cabrera v. City*

3. All footnotes and citations omitted.

of Huntington Park, 159 F.3d 374, 308 n. 6 (9th Cir. 1998)[4] (holding that *Heck* applies in all section 1983 suits regardless of the plaintiff's access to habeas) and *Figueroa v. Rivera*, 147 F.3d 77, 81 n. 3 (1st Cir. 1998)."

Guidance from this Court is necessary to light the way for the circuits split on this issue.

Of *DeLeon*, applying *Heck* to a habeas ineligible plaintiff, in this case, the Fifth Circuit found that "*Heck* barred Appellant's excessive force claim where his complaint maintained that he did not resist arrest and did nothing wrong and provided no alternative pleading or theory of recovery."

The Eleventh Circuit, and numerous others, have taken the opposite approach and not only limited both the "necessarily" requirement of *Heck*, but those circuits have also found that *Heck* does not apply to habeas ineligible plaintiffs.

For example, in *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007), a Plaintiff, who was charged with "resisting arrest without violence" for interfering with an ongoing arrest of another Plaintiff was not barred from bringing a § 1983 claim for false arrest. According to the Eleventh Circuit the primary claims barred by *Heck* are those for an **allegedly unconstitutional conviction or imprisonment**. The second application of *Heck* only bars suits to recover damages "for other

4. But see, *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (*Heck* inapplicable where plaintiff already released from jail).

harm caused by actions whose unlawfulness would render a conviction or sentence invalid." Citing, *Heck*, 512 U.S. at 486, 114 S.Ct. 2364. In such cases, the Defense must show that the Plaintiff would have to "negate an element of the offense of which he has been convicted."

To the extent *Heck* applies to claims for which there is no habeas corpus avenue, the test set forth by the *Heck* case is as follows:

> But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any **outstanding criminal judgment** against the plaintiff, the action should be allowed to proceed. *Heck*, 512 U.S. at 487, 114 S.Ct. at 2372. [Emphasis added]

In *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007), a plaintiff, convicted of resisting arrest with violence, brought a § 1983 action for excessive force. Rejecting the application of *Heck*, the Eleventh Circuit, wrote, "[A] finding of excessive force by the jury in this civil case does not necessarily call into question the validity of section 1983 Plaintiff's criminal conviction [for attempted murder and battery of an officer]."[5]

> "A reasonable jury could, without too much trouble, find both that the defendants used

5. Citing and quoting, *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir. 2001), *cert. granted and vacated on other grounds*, 537 U.S. 801, 123 S.Ct. 68, 154 L.Ed.2d 2 (2002).

> excessive force, and that not all of plaintiff's violent acts were justified as self-defense. In other words, the determination is ultimately factual, and thus we cannot say, as a matter of law, that a successful § 1983 suit would necessarily negate the underlying conviction given the facts in the record."

Quoting the Seventh Circuit,[6] the Eleventh Circuit, through *Dyer*, provided a strong policy reason for not interpreting *Heck* as the Fifth Circuit has done and wrote, as follows:

> Were we to uphold the application of *Heck* in this case, it would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as they wanted — and be shielded from accountability under civil law — as long as the prosecutor could get the plaintiff convicted on a charge of resisting. This would open the door to undesirable behavior and gut a large share of the protections provided by § 1983.

The Eleventh Circuit's policy rationale alone provides a basis for this Court to resolve the split in the circuits. As long as there is a version of the facts which would allow the conviction to stand, that is sufficient, under *Heck*, to allow this § 1983 action to proceed.

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6. *VanGilder v. Baker*, 435 F.3d 689, at 692 (7th Cir. 2006).

Quoting the Supreme Court,[7] the Seventh Circuit, through *VanGilder*, 435 F.3d at 692, wrote, "In a more recent case, the Court emphasized the need for a clear nexus between the plaintiff's conviction and the alleged wrongful government action before the *Heck* bar applies. As Justice O'Conner wrote for a unanimous Court,

> [W]e were careful in *Heck* to stress the importance of the term 'necessarily.' For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not '*necessarily* imply that the plaintiff's conviction was unlawful.' 512 U.S. at 487, n. 7, 114 S.Ct. 2364 (noting doctrines such as inevitable discovery, independent source, and harmless error). To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination . . ."

In a recent Second Circuit decision, *McKithen v. Brown*, 481 F.3d 89, 102 (2d Cir. 2007), focusing on the "necessarily" requirement of *Heck*, the Second Circuit explained that "a § 1983 action that, at most, increases the *likelihood* that a plaintiff will eventually be able to overturn a still outstanding conviction, but which does not go so far as to *necessarily* demonstrate the conviction's validity" may still proceed.

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7. *Nelson v. Campbell*, 541 U.S. 637, 647, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004).

In *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592 (6th Cir. 2007), the Sixth Circuit noted the split in the circuits as to whether *Heck*'s favorable termination rule applies to § 1983 plaintiffs who are habeas ineligible, citing, *Muhammad*, where this Court found that *Huey v. Stine*, 230 F.3d 226, 230 (6th Cir. 2000), was not the case to settle that issue. Citing the split in the circuits, Sixth Circuit found that the better reasoned view is that of the Second, Ninth and Eleventh Circuits that *Heck*'s favorable termination requirement does not apply to habeas ineligible § 1983 plaintiffs. The split cited was *Figueroa v. Rivera*, 147 F.3d 77, 79 (1st Cir. 1998) (Heck bar applied to convict who died in prison even after death); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (declining to read *Spencer v. Kemna*[8] to allow former prisoner to maintain his § 1983 action); *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir. 1005) (*Heck* applies to habeas ineligible plaintiff); *Randell v. Johnson*, 227 F.3d 300, 301-02 (5th Cir. 2000) (applying *Heck* to plaintiff who was no longer imprisoned) compared to *Leather v. Ten Eyck* 180 F.3d 420, 424 (2nd Cir. 1999) (*Heck* inapplicable where plaintiff had been assessed only a monetary fine and ineligible for habeas relief); *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (*Heck* inapplicable where plaintiff already released from jail); *Harden v. Pataki*, 320 F.3d 1289, 1298-99 (11th Cir. 2003) (*Heck* inapplicable where plaintiff challenging extradition procedure had already been extradited).

In the minority position, the Fifth Circuit not only applies *Heck* to habeas ineligible plaintiffs, but also

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8. *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998).

interprets it to apply unless the plaintiff alleges that the excessive force occurred either before or after **but not during a... arrest.**[9]

Louisiana defines the crime of resisting arrest,[10] as follows:

> Resisting an officer is the intentional interference with, opposition or resistance to, or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity.

The model jury instructions for the Fifth Circuit Court of Appeal for excessive force claims provide, in part, as follows:

> The third aspect of the plaintiff's claim is that the defendant(s) used excessive force in making the arrest. Every person has the constitutional right not to be subjected to unreasonable or excessive force **while being arrested by law enforcement officers, even though such arrest is otherwise proper.** However, in making a lawful arrest, an officer

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9. *Arnold v. Town of Slaughter*, 100 Fed.Appx. 321 (5th Cir. 2004).

10. La. R.S. 14:108 Resisting an officer.

has the right to use such force as is necessary under the circumstances to complete the arrest. You must determine whether the force used in making the arrest of the plaintiff was unnecessary, unreasonable or excessively violent. **The force used in making an arrest is unnecessary, unreasonable or excessively violent if the arresting officer exceeded that degree of force which a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances.**

* * * *

1) The defendant intentionally committed acts which operated to deprive the plaintiff of a right secured by the Constitution of the United States;

2) The defendant acted under color of the authority of the State of Louisiana;

3) That the defendants acts were the legal cause of the plaintiff's damages.

United States citizens are protected against the use of excessive force by the Fourth Amendment to the Constitution. In order to prove that the defendant used excessive force in violation of the Fourth Amendment, the plaintiff must prove by a preponderance of the evidence: 1) some harm, that 2) resulted directly and only from the use of force that

> was clearly excessive to the need; and the excessiveness of which was 3) objectively unreasonable in light of the facts and circumstances at the time.
>
> * * * *
>
> The reasonableness inquiry is an objective one: the question is whether the officers actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. 2006 FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS — CIVIL, at 77-79.

The Pattern Jury Instructions themselves contemplate a claim for use of excessive force by an officer *while* effectuating a lawful arrest, which lawful arrest could also lead to a conviction for resisting arrest.

The status of the law in the Fifth Circuit allows a stay of the civil action pending conviction on a charge for resisting (exhaustion criminal procedures). The claim is further subject to dismissal on the basis of *Heck* except in instances involving 1) an officer who is not smart enough to institute a charge for resisting; or 2) the rare not guilty verdict on the charge. Such requirements to prosecute a Fourth Amendment civil rights violation are not on the books and have a chilling effect on filing such claims.

This Court's intervention is necessary to protect civil rights claims from virtual extinction in the Fifth Circuit.

In the *Walker* matter, before this Court, the Officers offer no explanation for, and denied using any physical force that would have explained the injuries that Mr. Walker sustained. Mr. Walker has produced proof of his injuries and they were not there before he left for Wal Mart.

The District Court dismissed the present action with prejudice "until *Heck* conditions are satisfied", which is tantamount to a finding of prematurity, lack of ripeness or other cause to avoid this lawsuit.[11] Such a finding is contrary to *Wallace*, which held that the applicable statute of limitations starts to run from "the time the claimant becomes detained pursuant to legal process." *Wallace v. Kato*, 127 S.Ct. 1092, 1000 (2007).[12] It cannot be that the statute of limitations runs from the time the claimant is detained, yet, the claim is premature and subject to dismissal with prejudice until such time as the conviction upon which detention was based is reversed. Such concepts are mutually exclusive.

In *Edwards v. Balisok*, 520 U.S. 641, 649, 117 S.Ct. 1584, 1589, 137 L.Ed. 2d 906 (1997), Justice Scalia wrote as follows:

> Since we are remanding, **we must add a word concerning the District Court's decision to stay this § 1983 action** while respondent

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11. See, *Brandley v. Keeshan*, 64 F.3d 196 (5th Cir. 1995) (holding that a false arrest cause of action accrues when the criminal prosecution terminates in favor of the accused).

12. *Wallace v. Kato*, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

> sought restoration of his good-time credits, rather than dismiss it. **The District Court was of the view that once respondent had exhausted his state remedies, the § 1983 action could proceed.** App. to Pet. for Cert. F-14. **This was error. We reemphasize that § 1983 contains no judicially imposed exhaustion requirement,** *Heck*, 512 U.S., at 481, 483, 114 S.Ct., at 2369, 2370-2371; **absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward,** or is not cognizable and should be dismissed. (Emphasis added)

Here, the lower courts have erred in dismissing the excessive force claim "with prejudice to their being asserted again until the *Heck* conditions are met."

B. Where the Plaintiff was not sentenced to incarceration and has no legal basis to file a writ of habeas corpus, did the lower courts err in finding *Heck* applicable to the present § 1983 action?

Finding that *Heck* applies not only to prisoners, but also to those convicts who do not have a remote possibility of invoking habeas corpus relief from confinement, here, the District Court, itself, cited, *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000), and *Dible v. Scholl*, 410 F.Supp.2d 807, 822, nt. 11 (N.D. Iowa 2006), to show the split in the circuits on this issue.

The *Dible* court critically rejected both the holding and rationale of *Randell* and explained why there is good

cause for this Court to clarify these issues amongst the circuits, 410 F.Supp at 825, writing,

> "'It is unfair to require a person who is legally precluded from challenging his or her conviction or sentence on habeas grounds to demonstrate that the conviction or sentence had been overturned or invalidated.'[13] A conclusion to the contrary would create a 'patent anomaly,' whereby prisoners who are still in custody are provided with a forum to redress constitutional wrongs, but those individuals who are no longer in custody or never were in custody have no forum in which to enforce their rights. . . . Therefore, this court concludes that *Heck*'s favorable termination requirement is not applicable to a § 1983 plaintiff who is unable as a matter of law to bring a habeas petition to challenge a conviction or sentence."

This very same rationale should apply in the all circuits.

In *Pethtel v. Washington County Sheriff's Office*, 2007 W.L 2359765 (S.D. Ohio 2007), that court wrote, as follows:

> Moreover, because Plaintiff's sentence consisted of a fine rather than imprisonment, a habeas remedy was never available to him. **As the Sixth Circuit has noted, five justices**

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13. Citing and quoting, *Zupan v. Brown*, 5 F.Supp. 2d 792, at 797 (N.D. Cal. 1998).

> **of the Supreme Court are of the belief that the *Heck* bar, requiring a plaintiff to have his sentence or conviction invalidated before filing a § 1983 suit, does not apply when the plaintiff has not been sentenced to a term of imprisonment.**[14] [Emphasis added]

Here, Mr. Walker was not subject to confinement and *Heck* does not apply. This rule should apply in all circuits.

The *McClish* Court, 483 F.3d at 1252, note 19, recited the entire history of the *Heck* line of cases and noted that "the [Supreme] Court had 'expressed the view that § 1983 claims are barred only when the alternative remedy of habeas relief is available.'"[15]

In *Wilkinson v. Dotson*, 544 U.S. 74, 76 and 83, 125 S.Ct. 1242, 1244, 161 L.Ed.2d 253 (2005), this Court clarified its use of the word "sentence" in *Heck* and explained that in *Heck* the word "sentence" refers to "substantive determinations as to the length of confinement." Success on the merits of Mr. Walker's excessive force claim will not in any manner affect Mr. Walker's conviction, his record, or result in a rebate of his fine. Moreover, Mr. Walker's civil claim does not

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14. Citing, see, *Fox v. VanOosterum*, 176 F.3d 342, 352 n. 8 (6th Cir. 1999). See also *Johnson v. Freeburn*, 144 F. Supp.2d 817, 827 (E.D. Mich. 2001).

15. Citing, *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir. 2005), and cases cited therein.

lie at "the core of habeas corpus." This Court's numerous precedents following *Heck* have been pieced together by the circuit court, as if building a jigsaw puzzle, resulting in the creation of two completely different pictures. This Court should grant this writ application and resolve the split in the circuits and explain in this case just how the puzzle pieces fit together.

Through *Heck*, this Court

> "has developed an exception from § 1983's otherwise broad scope for actions that lie 'within the core of habeas corpus,'[16] where a state prisoner requests present or future release. Section 1983 remains available for procedural challenges where success *would not necessarily* spell immediate or speedier release for the prisoner,[17] but the prisoner cannot use § 1983 to obtain relief where success *would necessarily* demonstrate the invalidity of confinement or its duration."[18]

Wilkinson, 544 U.S. at 74-75, 125 S.Ct. at 1243-1244.

This Court should find that the circuit courts that apply *Heck* to habeas ineligible plaintiffs, like Mr. Walker, are in error.

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16. Citing, *Preiser v. Rodriguez*, 411 U.S. 475, 487, 93 S.Ct. 1827, 36 L.Ed.2d 439.

17. Citing, see, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

18. Citing, see, e.g., *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed. 2d 383.

C. Where the Defendants failed to affirmatively assert a *Heck* related defense in their *Answer*, was the *Heck* defense waived and did the lower courts err in allowing the Defendants to raise by motion a defense not pled in the answer?

The Plaintiffs have consistently maintained an objection to the District Court hearing an affirmative defense not raised in the answer.

FRCP 8 (c), provides in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction . . . res judicata . . . **and any other matter constituting an avoidance or affirmative defense.** [Emphasis added]

FRCP 12 (b), provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . .

Here, the Defendants failed to plead the affirmative defenses of prematurity, failure to exhaust administrative procedures, ripeness, justiciability, collateral estoppel, *res judicata*, or any other corollary defense which may implicate *Heck*.

In failing to plead the *Heck* defense in their answer, the Defendants waived it. FRCP 8 (c), provides that "[i]n pleading to a preceding pleading, a party **shall** set forth affirmatively . . . **any other matter constituting an avoidance** [of the claims]". The failure to raise the *Heck* defense in the answer constitutes a waiver and summary judgment and/or a motion to dismiss should have been denied on that basis. See MOORE'S FEDERAL PRACTICE § 8.07. See also, *Laughman v. Pennsylvania*, 2007 WL 2345295, * 7 (M.D. Pa. 2007).

The lower courts erred in allowing the Defendants to raise by motion a defense not previously pled in the *Answer*.

D. Did the district court err in failing to certify its ruling on the excessive force claim for appeal?

The District Court abused its discretion in failing/refusing to certify its disfavorable summary judgment ruling that dismissed the excessive force claim for immediate appeal. The only claim that remained after the District Court dismissed the excessive force claim with prejudice was the failure/delay in medical treatment claim. Because that claim alone is not economically feasible to litigate, the Plaintiffs had to dismiss it to seek review of the dismissal of the excessive force claim.

It was not reasonable for the District Court to require the Plaintiffs to try that small claim, then appeal the main claim, and, then, possibly try the main claim.

This Court should grant this writ application and consider the Fifth Circuit's application of *Heck* to this case and the many others cited herein.

CONCLUSION

This Court is the gatekeeper for civil rights claims.

This writ application should be granted so that this Court may consider the course that dicta in *Heck* has taken and the prejudice it has reeked on civil rights claims in the Fifth Circuit.

Respectfully submitted,

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